No. 5900

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT COURT

GLOBE AND RUTGERS FIRE INSURANCE COMPANY, a corporation,

Appellant,

—V.—

JOHN SKANSI,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

BRIEF OF APPELLEE

CHARLES T. PETERSON,
Attorney for Appellee.
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STATEMENT OF THE CASE

Appellant's statement of the issues as made by the pleadings is correct. Its statement of the facts is subject to criticism. It appears, to my

mind, that the evidence supporting the judgment of the Trial Court is not fully stated, but the facts are presented in a light most favorable to appellant's contention. Extracts are gathered here and there from the testimony of witnesses, which may tend to give this Court an incorrect understanding of the situation. Appellee, therefore, deems it necessary to restate the facts.

JOHN SKANSI, the owner of the gas boat "Companion," entered into a charter-party on February 17, 1925 with a corporation known as the "A. & P. Products Corporation," by the terms of which he chartered his vessel to that company from June 1, 1925, to September 15, 1925, at a hire of $2500.00.

The charterer agreed to pay the premium for full marine insurance to the extent of $10,000.00 covering the term of the charter, which, it will be observed, was for a period of three and one-half (3½) months. In addition to the $10,000.00 of insurance above referred to, appellee, Skansi, provided for $1300.00 additional on his own account, making the policy issued by appellant $11,300.00, and in addition thereto had two separate policies,—one for $500.00 and another for $200.00, issued to him direct by the Yangtze Insurance Association. (Ap. 61).

The policy by its terms became effective on March 16, 1925 and expired March 16, 1926. The annual premium thereon was $621.50, (See original policy, Exhibit) of which premium appellee, Skansi, paid $461.08 and the balance was paid by the A. & P. Products Corporation. (Ap. 131). The full amount of this premium was received and has been retained by the company. (Ap. 101).

During the war Skansi began doing business with Wilbur E. Dow & Co., customs house brokers, also engaged in the marine insurance business at Seattle, Washington, who will be hereafter referred to as the "Dow Co.". This company was not a licensed broker, neither was it a licensed agent of appellant, who will be hereafter referred to as the "Insurance Co." (Ap. 65,67).

It was the custom of Skansi and other fishermen as well, who were engaged in fishing in Alaska, to proceed to Alaska, leaving their policies with the Dow Co. at Seattle until they returned in the fall. (Ap. 56).

During the year 1925 appellant was represented at Seattle, Washington by Burgard-Sargent, Inc. Apparently, during the year 1924 Dow and Burgard-Sargent were working togther in connection with the placing of marine insurance, (Ap. 90) as we find in March, 1924, Dow writing that company saying:

> "We regret exceedingly, after all our efforts, that we could not swing the fleet of the A. & P. Products Corporation, but we will continue to work together in *every possible manner* and perhaps later on the situation will clear up." (Italics ours). (Exhibit 14, Ap. 90).

Mr. C. A. Burckhardt, President of Burgard-Sargent, Inc., operated several canneries in Alaska and did a considerable customs house business with Dow Co., and according to Dow, Mr. Burckhardt called him in one day and said,

> "I am operating seven canneries, and you have to do business with my companies or I will take the customs house business away from you." (Ap. 68).

There was strenuous competition between the different companies for marine insurance. (Ap. 78, 79). According to Sargent three or more vessels were considered a fleet and could be insured at a more favorable rate than a single boat, (Ap. 103) although in his previous testimony he stated that there would be no difference in the rate. (Ap. 103).

Early in the year 1925 Dow got in touch with Skansi, and notified him that he had the policy of insurance, (Ap. 57). Apparently Dow had charge of the chartering of the boat from Skansi and proceeded in that connection to obtain

the insurance. Preliminary to the policy of insurance becoming effective, Dow, at the request by letter dated March 17, 1925, of Burgard and Sargent (Exhibit "G", Ap. 100), had the vessel "Companion" surveyed and a surveyor's report thereon made in quadruplicate, a copy of which (Exhibit "C", Ap. 60) was transmitted to Burgard-Sargent on March 21, 1925, This report is one made by the Board of Marine Underwriters, of San Francisco, marked "private-confidential", covering the vessel "Companion", contains a full description of the vessel and gives the name of the owner, "J. Skansi," built by Skansi. Under the title "Remarks," is the following:

> "Held a careful survey on the vessel while afloat, found her in good condition throughout. She will engage as cannery tender at Whitefall and Union Bay, Alaska, canneries. Consider her suitable for this trade." Signed "' John M. Sheriff, Surveyor.'" (Ap. 60).

Dow testified,

> "I would not have receivied the policy from them without the certificate." (Referring to the Surveyor's Report, Exhibit "C"). "The surveyor's report was sent to Burgard-Sargent on March 20, 1925, and the policy delivered by them on March 21, 1925. No vessel can be insured without such report."

In September, 1925 (the vessel having been damaged in northern waters, having two accidents, —one on June 25 and one on June 30), a protest or proof of loss under the policy sued on in this action was made, reciting the name of the owner of the vessel as John Skansi and that it was under charter to the A. & P. Products Corporation. The two losses were adjusted and apportionment made. The adjustment by Johnson and Higgins shows that there was then other insurance on the vessel than the policy of appellant. This adjustment seems to have been made and loss paid November 27, 1925. (Ap. 61).

In September, 1925, after the "Companion" had returned to Seattle, Skansi called on Dow Co. and advised it that the vessel had completed her charter-party and that he desired to fish on the Sound.

DOW testified that he called Sargent, Manager of the Marine Department of Burgard-Sargent, and said to him that,

> "The vessel was now off the charter-party and that the owner, John Skansi, desired to use the vessel on Puget Sound and I wanted an endorsement to conform as to how the other vessels were insured * * * and Mr. Sargent told me that he would fix up the indorsement; that it was perfectly all right, tell him

to go out. * * * The policy was then in my safe. * * * I saw Mr. Skansi afterwards regarding it and assured him that his vessel was fully covered. He received the policy just before his departure for Europe. The June losses adjusted through Johnson & Higgins were paid to me, and Burgard & Sargent knew that these other companies were involved in those losses and that Skansi was the owner of the boat. * * * I knew who the insured was under the Yangtze policies that were involved in this September settlement, and I communicated that fact to Burgard-Sargent." (Ap. 62, 63).

The witness further testified:

"I showed Mr. Sargent the policies. At first we were going to try to have it adjusted without the expense of an outside adjuster. I told Burgard & Sargent that John Skansi was the insured under those policies; * * * that John Skansi was the owner at the inception of the policy itself. At the time there was a contest on in Seattle for this business. Frank Frederick, representing other companies, was contesting for it and the rate was being cut from day to day between these companies. Frederick would offer one rate; Sargent would offer another. Some of these offers were

made to me and Frederick went direct to my clients. This group of vessels was being handled for the purpose of insurance as a fleet, this being the basis upon which we were able to cut the rates down." (Ap. 66).

"When I handled this insurance business for Skansi he did not tell me in what company to place it. I explained the whole situation to Sargent. It was agreed that everything would be put in the A. & P. Products Corporation's name. Sargent was out for the business and we discussed rates, terms and conditions to determine the name of the insured for the fleet policies. We agreed that everything would be put through at 6 per cent. Frederick comes in and offers it for 5½ per cent, and I go back to Sargent and he gave us a credit memorandum or a blow-back. I told him that Skansi owned the "Companion" and what the situation was, and it was mutually agreed between us that it would be written in the name of the A. & P. Products Corporation." (Ap. 70, 71).

It will be conceded that the premiums were collected by Dow, who received 10 per cent of the gross, remitting the balance to Burgard-Sargent.

(JOHN SKANSI) Regarding the indorsement of October 19, 1925, John Skansi testified that while the boat was in dry dock in September, 1925,

at Seattle for repairs on account of damage up North, that he called on Mr. Dow and told him that he wanted him to put an indorsement on the policy so that he could use it on Puget Sound, and that Dow called Sargent and told him. Skansi said that he did not know much about the policy because he had had no educational opportunities, and that he wanted it in his own name; that he did not know it was in the name of the A. & P. Products Corporation and that he thot it was o-kay until after the boat burned. (Ap. 56, 57).

LORENE BROWN JACOBSON, Dow's bookkeeper, testified she handled all the details of the insurance in respect to the gas boat, "Companion;" that Nick Skansi (brother of appellee) came into the office in September or October, 1925, and wanted an indorsement of the policy, as the A. & P. Products Corporation had finished with the boat and they were using the boat themselves on Puget Sound.

> "I said to Mr. Sargent, in effect, that Mr. Skansi was in the office and wanted an indorsement covering the boat while he was operating it on Puget Sound. Mr. Skansi was the owner of the "Companion" and we wanted the policy indorsed so that Mr. Skansi was covered while he was operating it himself. Mr. Sargent said that he would give us an indorsement covering the—— that is about all

that was said. Mr. Sargent said that Mr. Skansi could operate the boat and that he would have the indorsement over there very shortly. In regard to the getting of that indorsement,— Mr. Skansi was in the office twice that I remember. The second time was the time I called up Mr. Sargent's office. * *

* I told Mr. Skansi that he could take the boat out and we would furnish an indorsement." (Ap. 96-99).

Cross Examination (LORENE BROWN JACOBSON)

"Mr. John Skansi came in with Nick Skansi the first time and Mr. Dow took the matter up, but the second time Nick Skansi came in and he handled the matter.* * * Mr. Dow called up Mr. Sargent. I did not hear the conversation. These conversations were after the boat had returned from Alaska in the early fall. * * * " (Ap. 97).

(NICK SKANSI) The witness Nick Skansi, testified that he was in the office of the Dow Co. and that Miss Brown had a telephone conversation with a man named Sargent regarding the indorsement. (Ap. 112).

(C. P. SARGENT) The witness Sargent, denied having any conversation regarding the matter with Mrs. Lorene Brown Jacobson. (Ap. 112).

MITCHELL SKANSI testified that shortly after the loss he was in Mr. Sargent's office in company with Nick Skansi, and after discussing the matter, Sargent stated that he knew all the time John Skansi was the owner of the "Companion." (Ap. 106).

The testimony of Mitchell Skansi in this connection is corroborated by Nick Skansi. (Ap. 107).

The Trial Court in the course of its decision said:

> "The evidence shows that Burgard, Sargent, Inc., was the agent of the defendant. It shows that the plaintiff dealt directly with the witness Dow of Wilbur E. Dow Co., Inc., hereinafter designated as The Dow Company.
>
> "The preponderance of the evidence shows that Dow knew that plaintiff had long been the owner of the vessel; that plaintiff, in effect, requested Dow to have the policy fixed so he could use the vessel on Puget Sound; that Dow understood that to do this would require a rider naming the plaintiff as the assured and a change in the description of the waters in which the boat was to operate and that Dow told plaintiff that such change would be made. It is also shown that Dow thought, after conversation with Sargent of Burgard, Sargent, Inc., the changes had been made. Sargent ap-

pears to have had the active management of at least the details of the Insurance business of his company. As between Dow and Sargent the question is, who made the mistake in not changing the policy to name the plaintiff as the assured. If it was Sargent's mistake, no question is made but that the policy should be reformed, but defendant claims that the mistake was solely that of Dow; that he never asked Sargent to change the name of the assured and that Sargent never promised to do so.

"Plaintiff also contends that in this matter Dow was defendant's (38) agent. If he was, the policy should be reformed. Until the latter issue is determined it is not necessary to consider other matters which have been discussed.

"The evidence shows that at the time this policy of insurance was written and prior thereto there was keen competition among those writing insurance, and that rates were being cut. It is shown that The Dow Company was in the Custom House Brokerage business as well as that of securing insurance; that C. A. Burckhardt, the President of Burgard, Sargent, Inc., had interests that placed in his control or at his disposition certain custom house brokerage business; that The Dow Company handled this business from 1924 to the date of trial. Dow appears to have controlled

the disposition, for the year 1925, of the insurance of the fishing fleet of the A. & P. Products Corporation. Dow testifies that Burckhardt told him, Dow, in effect, that unless Burgard, Sargent, Inc., got the insurance of this fleet he would take this custom-house business away from the Dow Company. The Court is asked to reject this testimony because of what are termed Burckhardt's 'flat and unequivocal denials' of it.

"It is true that Burckhardt first testified that he made no such statement to Dow as that he would take from the latter this custom-house business unless Burgard, Sargent, Inc., got the insurance but later in his examination he stated that he talked with Dow about reciprocity.

"There has been no claim in this case that he referred to aught else than Dow's delivery of insurance to Burgard, Sargent, Inc., and Burckhardt's delivery of custom-house brokerage business to The Dow Company. Burckhardt nowheres denies that he was the one who broached this subject. If The Dow Company was, (39) as contended by the defendant, an insurance broker, acting as agent of the plaintiff and not as agent of the defendant, this inducement held out by Burckhardt to influence

The Dow Company in placing this insurance, was sufficient to make The Dow Company the employee or instrument of Burgard, Sargent, Inc., and through that company of the defendant. The softened phrase in nowise changes the essence of this transaction." (Ap. 43-45).

ARGUMENT

But two questions are involved in this case.

FIRST: Was plaintiff entitled to a reformation of the policy in question entitling him to maintain an action thereon for the avails of the policy?

SECOND: Under the policy as reformed, was plaintiff entitled to a recovery?

An attempt to follow appellant's argument *seriatim* would, to my mind, tend to confuse rather than enlighten. I will, therefore, endeavor to sustain the judgment of the Trial Court by showing that it is supported by the great weight of the evidence and is the most logical conclusion to be reached from an intelligent consideration of the same.

REFORMATION

Apparently the placing the policy involved here in addition to the six or seven other policies referred to in the evidence, was the realization and consummation of the plan of Dow Co. and Burgard-Sar-

gent in continuing to work together "*in every possible manner*" to swing the Marine Insurance referred to in Dow's letter to Burgard-Sargent written in March, 1924. (Ex. 14, Ap. 901). That the uneducated and confiding appellee was unaware of this plan is, of course, beyond the range of dispute; it is altogether likely that Dow's avowed intention to work with Burgard-Sargent "*in every possible manner*" was largely the result of Burckhardt's control of Dow through giving him the custom-house busines which the trial court, as appears from its opinion, regarded as a circumstance of controlling importance.

It must be manifest to this Court, as it apparently was to the Trial Court, that because of the keen competition between the different insurance companies for the volume of insurance, of which the policy sued on here was a part, that Burgard-Sargent and Dow, with full knowledge of plaintiff's ownership of the boat "Companion," entered into an arrangement to cover up the known true ownership of the boat and put it under the fleet rate, which was lower than the individual rate, so as to meet competition and get the business for appellant. Dow's testimony in this connection is worthy of repetition—here, he said:

> "Q. And there was no mistake then made in the preparation of that endorsement as originally drawn?

"A. It was drawn by mutual agreement. No mistake that I know of. (Ap. 76-77).

"There is always a different insurance rate for a fleet. Three or more vessels get a lower rate than one. The reason John Skansi was not named as owner in this endorsement was to get the benefit of the lower rates—fleet rates. I discussed that with Mr. Sargent. Mr. Sargent and I were interested in keeping the business for the Globe & Rutgers.

"Q. And the reason for not mentioning John Skansi then was so that you could give a rate that would keep the business from going to some other company or agency; that is true, isn't it?

"A. That is very true, so we did not put his name on the policy." (Ap. 78).

Dow later testified:

"There was a mutual agreement as to how the endorsement should be drawn up. That was between Mr. Sargent and myself. Mr. Skansi was not a party to that. When I said there was no mistake as to that endorsement, I meant there was no intentional mistake. The endorsement is not as Mr. Skansi requested it.

"When that endorsement came back, I do not have any definite knowledge that I looked

at it. I might have. I had the policy in the office. In the matter of the endorsement, Mr. Skansi wanted to be covered. He asked me to be covered, and I communicated that to Sargent." (Ap. 80).

The trial court no doubt took judicial notice of the fact, as this Court will, that it is a common practice and custom of insurance companies to file rate schedules, and that practically every state has statutes prohibiting rate cutting and discrimination in the writing of policies or taking premiums less than stated in their filed and published rate schedules.

It is quite evident from the foregoing testimony that in so far as Dow and Sargent were concerned their only interest was in *keeping the business for the Globe & Rutgers* at the expense of plaintiff and without regard to his rights. The record in this case is persuasive evidence that they were eminently successful in their efforts.

I submit that the learned Trial Court very properly concluded that Dow was the debauched tool of the Insurance Company (Ap. 85) and thereby in law became its agent.

In Meachem on Agency (Sec. 797) the author says:

"So where the third person, by surreptitious dealing with the agent, or by corrupting him

> or leading him astray from his duty, has obtained the property of the principal, or has secured, from the principal, contracts, obligations or rights in action the defrauded principal, * * * is entitled to recover his property, and to have the contracts, obligations or rights of action rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as a court of equity may deem proper under the circumstances."

Here the evidence conclusively shows, and the Trial Court found that appellee's agent had been led astray from his duty and corrupted by appellant. It may be contended that the conduct of appellant's agents, Burgard-Sargent, in this connection, arose out of their desire to make the agency profits out of this business for themselves, and that they, too, were unfaithful to their principal. If this were true, it cannot be taken advantage of by appellant at this time, since it has had knowledge for a long time of Dow's duplicity and of the details of the transaction and, notwithstanding, has retained the premiums paid by Skansi, thereby ratifying the acts of its agents.

The Trial Court, as a court of equity, gave appellee the only adequate relief that should have been given under the circumstances.

APPELLANT HAD NOTICE THAT SKANSI WAS THE OWNER OF THE VESSEL AND THE A. & P. PRODUCTS CO., A CHARTERER OF THE VESSEL FOR THE PERIOD OF THREE AND ONE-HALF MONTHS ONLY OF THE TERM.

This fact was communicated to Sargent, by Dow at the inception of the policy. (Ap. 64); by the surveyor's report received by the company before the policy was delivered (Ap. 61); by the protest or proof of loss sent to the company in September, 1925, regarding the losses of June 25 and 30, 1925 (Ex. "D" Ap. 61); by Mrs. Jacobson (Ap. 96-99); by Dow himself, who became the agent of appellant because it debauched him; and knowing that Skansi was the owner and that the vessel was chartered, it will as a matter of law, be deemed to have had notice of all facts appearing on the face of the charter-party.

In the case of *Robbins v. Milwaukee Mechanics Ins. Co.* (102 Wash. 544), the Supreme Court, speaking of the question of notice said:

> "This court has recognized this doctrine in *Gaskill v. Northern Assurance Co.*, 73 Wash. 668, 132 Pac. 643. True, in that case, it is said that the agent had actual knowledge of the ownership of the property. But it is not perceived that there should be any difference

in applying the rule where the agent had notice and means of knowledge."

On the question of notice it is familiar law that where a person is charged with notice, or actually knows of an instrument, he is also charged with notice of all facts appearing on the face of the instrument or to the knowledge of which anything there appearing would conduct him. (20 R. C. L. 353, Sec. 15; *Ibid.* p. 349, Sec. 10).

It seems to me that it is too much of a tax on human credulity to say that Skansi who was paying all of the annual premium of $621.00 except for that portion only of the year from June 1 to September 15, was not giving any attention to this indorsement in view of his testimony that in prior years he went through the same routine each year. Counsel for the Insurance Company seek to justify their position by contending that it was just as easy for Sargent to write in the name of Skansi in the policy as to leave it out and Sargent endeavored at the close of his testimony to tell the Court that he could have done that inasmuch as the boat was under charter to the A. & P. Products Company. The force of this is lost when we consider that the A. & P. Products Company did not have any insurable interest until June 1, 1925,—months after the policy was written, which insurable interest expired on September 15, and that for the

other eight and a half months of the year the sole interest was in Skansi.

FAILURE TO READ POLICY OR INDORSEMENT

The failure of Skansi to read the policy or the indorsement, as the case might be, while it may indicate carelessness on his part, does not entitle the company to repudiate the contract.

In the case of *McElroy vs. British America Assurance Co.* (94 Fed. 990), this Court, referring to the failure of the assured in that case to read the policy, said:

> "It would certainly have been an act of prudence on his part to read the entire policy, but his neglect to do so cannot excuse the company for the default of the agent in not writing the contract in accordance with the representations made by the insured. The insured had a right to rely upon the agent's performing his duty of making the contract in conformity with the information given, and the agent's failure to do so, whether the result of a mistake or of a deliberate fraud, cannot operate to the prejudice of the insured."

In that case the Court quoted from a Pennsylvania case as follows:

> "Plaintiff had a right to rely upon the assumption that his policy would be in accordance with the terms of his oral application. If the defendant desired to make it anything different, defendant, in order to make it binding upon plaintiff under the authorities of this state, should have called his attention to those clauses which differed from the oral application."

DOW CO. WAS A SOLICITOR FOR APPELLANT

In addition to being in law the agent of appellant because it had debauched him, Dow was a solicitor for appellant within the statute, which defines that relationship as follows:

> "Solicitor or insurance solicitor is a person duly appointed, authorized and employed by a duly commissioned agent to solicit, receive and forward applications for insurance, and to collect premiums for the agent." (See Section 2909 Pierce's Code).

It is undisputed that Burgard-Sargent were commissioned agents and, while Dow was conducting a business of his own, it is undisputed that he was authorized and employed by Burgard-Sargent to solicit, receive and forward the application for the policy here, to deliver the policy and collect the premium, which he did, and for which service he was paid by them. In addition to that, he acted

for them in having the vessel surveyed. The correspondence shows that they requested him to act for them in preparing the indorsements.

In the case of *McElroy v. British America Assurance C.* above cited, the third section of the syllabus reads as follows:

> "3. Insurance—Agency of Solicitor. The insurance solicitor, who takes an application for insurance, which is approved and accepted by an insurance company, and on which it issues a policy, and delivers it to the solicitor, who delivers it to the insured, and collects the premium, is, by the ratification of his acts done in its behalf, made the agent of the company in the transaction, and his knowledge binds the company, notwithstanding a provision of the policy that no person, unless duly authorized in writing, shall be deemed its agent; the insured having no knowledge of the actual relations between the solicitor and the company."

The question of misrepresentation, Section 2941 Pierce's Code, provides:

MISREPRESENTATION NOT TO AVOID THE POLICY

> "No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance by the assured or in his

behalf shall be deemed material or defeat or avoid the policy or prevent it attaching unless such misrepresentation or warranty is made with the intent to deceive. * * * *

Section 3029 Pierce's Code, referring specially to marine insurance provides:

FIDELITY REQUIRED

"In marine insurance each party is bound to communicate in good faith all facts within his knowledge which are, or which he believes to be, material to the contract, and which the other has not the means of ascertaining and as to which he makes no warranty, and all the information which he possesses material to the risk, except that neither party to a contract of marine insurance is bound to communicate information of the matters following, unless it be in answer to the inquiries of the other: 1st, those which the other knows; 2nd, those which in the exercise of ordinary care the other ought to know and of which the former has no reason to suppose him ignorant. * * * *

Section 3033 provides:

INTENTIONAL FALSEHOOD

"If a representation of a person insured in a contract of marine insurance is intentionally

> false in any respect, whether material or immaterial, the insured may rescind the entire contract."

The Supreme Court of this State has had occasion to consider the questions involved here in numerous cases. We direct the Court's attention, first, to the recent case of *Lindstrom v. Employers Indemnity Corporation*, (146 Wash. 484; O.P. 491). where the Court said:

> "This Court has always held from the earliest times that, where no inquiry is made by the insurance company concerning the real title of the property involved, or where inquiry is made and truthful answers given by the applicant which were not incorporated in the application or the policy, the sole and unconditional ownership clause of the policy is waived by the insurance company."

citing a number of cases.

In *Reynolds v. Canton Insurance Company* (98 Wash. 425) the Court held that if, at the time the policy was issued, the appellant or its agent knew that the vessel was going beyond the trading limits prescribed in the marginal clause, it would be estopped from asserting the invalidity of the policy for a violation of that provision. It will be observed that the Court in that case cited and

quoted from the case of *McElroy v. British America Assurance Co.* (94 Fed. 990) above cited.

By the same token of reasoning employed in the Reynolds case, it may be said, that if, at the time the policy was issued, or later in October when the indorsement was issued, the agent had knowledge or means of knowledge that Skansi was the owner of the vessel, it would be estopped from asserting the invalidity of the policy. Indeed, the rule is stronger than that. In order to defeat Skansi's right to recover in this case, it must be shown that there was an intentional misrepresentation, within the provisions of the statute to which we have called attention.

In this connection we direct the Court's attention again to the case of *Robbins vs. The Milwaukee Mechanics Insurance Co.* (102 Wash. 539), where the Court held that a company is bound where the agent has knowledge or notice or means of knowledge of the fact.

We think the case last cited is decisive of every question raised here, and we urge the Court to read the same carefully. The following from that case is strikingly pertinent:

> "The appellant's contention that there was a breech of the warranty of title under the policy appears to be disposed of by the statute, Laws of 1915, Page 703, which provides:

'No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty is made with the intent to deceive.' (Rem. Code, Par. 6059-34).

"From all the evidence the Trial Court found that L. N. Kempf, in procuring the insurance, disclosed that he had not paid for the pool tables, and that he concealed none of these facts. It is apparent from the testimony that, had the agent followed up the inquiry, as he might have done, he could have ascertained the true facts as to the title to the property. There appears to be ample evidence to support the findings of the Trial Court in this respect, and we cannot find from a careful examination of the record and a reading of the statement of facts, that the evidence preponderates against such findings.

"It is argued, however, that there was no contractual relation between the respondent and the insurance company, and that the respondent has no interest in the policy and cannot recover thereunder. That the conditional bill of sale was of record is undisputed, and there is

no evidence tending to show that Mr. Goff, the agent who wrote the policy, had, or might have obtained, knowledge of the true condition. However that may be, the insurance company appears to have received its premium, the property was destroyed, and it ought not, in good conscience, to avoid paying the loss on a mere technicality. The legal title to the property was in the respondent. L. N. Kempf, as vendee, had contracted to keep it insured to at least the extent of the unpaid purchase price, and his interest had passed to Casper Kempf with full knowledge of such condition. The property being destroyed, the insurance money stands in lieu thereof, and it would seem equitable, under these conditions, for the court, if necessary, to order a reformation of the insurance policy so that it should protect the interest of the true owner of the property.

"This Court has recognized this doctrine in *Gaskill v. Northern Assurance Co.*, (73 Wash. 668; 132 Pac. 643) True in that case, it is said that the agent had actual knowledge of the ownership of the property. But it is not perceived that there should be any difference in applying the rule where the agent had notice and means of knowledge.

"It is also a familiar doctrine that a policy of insurance inures to the benefit of the mort-

gagee, whether the policy, by its terms, is so payable or not, if the mortgage, by its terms, requires the mortgagor to insure for the benefit of the mortgagee. (Citing Cases). And it is difficult to see any reason why the insurance company should complain because the Court below in effect found that the insurance money, which stood in the place of the property destroyed, in equity belonged to the owner of the property to the extent of the unpaid purchase price which was owing her."

The statute requires all companies to issue the New York standard form of policy; Pierce's Code, Section 3014, provides for cancellation by the insurer on a pro-rata refund of premium, and by the insured on the customary short rate refund, Section 3016 Pierce's Code.

APPELLANT IS ESTOPPED TO DISPUTE THE VALIDITY OF ITS CONTRACT AS AGAINST APPELLEE'S DEMAND IN EQUITY FOR REFORMATION

Notwithstanding the insurance company had notice of Skansi's ownership at the time the policy was issued, communicated to it orally and by the survey, and of the charter, and had knowledge again communicated to it in September by the protest under which it paid a partial loss and by the destruction of the vessel in December, yet it at all times retained the full premium paid, and with

knowledge of these facts it still retains the premium and at the same time contends that the policy was not in force or effect for a period of eight and one-half months of the term, the premium paid for that period being $461.08. It cannot, under well settled principles of law, affirm the validity of the policy for the purpose of retaining the premium, and disaffirm its validity for the purpose of escaping liability.

Of a similar situation, the Supreme Court of this State in *Staats v. Pioneer Insurance Association* (55 Wash. 60) said:

> "Moreover, as we shall see, the appellant retained the premium after full knowledge of all the facts, and it must therefore be held to have asserted the validity of its contract.
>
> There is, however, another principle of law which precludes the appellant from interposing this objection. The evidence discloses that it has received and retained the premium. True, this was not formally pleaded as an estoppel or waiver, but evidence of payment was admitted without objection, and the pleadings will be treated as amended so as to properly present the question.
>
> 'Clearly the defendant could not assert a right to the premium for valid insurance, and at the same time insist that the insurance had

never been effected. By claiming and maintaining such a right, with full knowledge of all material circumstances, it unequivocally affirmed the validity of the insurance for the period covered by the premium, and definitely waived every objection on which its validity could be denied.' (New Jersey Rubber Co. v. Commercial Union Assurance Co., 64 N.J.L. 580, 586.)"

To the same effect is *Baker vs. New York Life Ins. Co.* (77 Fed. 550; affirmed on appeal, 83 Fed. 648).

In *National Ohio Farmers Insurance Co. v. Williams*, (112 N. E. 556) the Appellate Court of Indiana said:

"This, as well as the Supreme Court and the courts of other jurisdictions generally, have frequently held that, both as to fire and life insurance policies, where a defense based upon a breach of the policy that renders the contract ineffectual from its inception and where in fact no risk attached, under such circumstances there is no consideration for the premium received, and that the insurer, upon learning of the breach should seasonably offer to restore the premium received by it, and, failing to do so, it could not insist upon forfeiture of the policy." (Citing cases).

If appellant's contention is correct in this case, no policy of insurance was effected in March, 1925, since the charter did not begin until June 1, and until then the charterer had no insurable interest, neither did it have an insurable interest after September 15, 1925.

Under the facts shown here, appellee is entitled to a reformation of the policy. *Gaskill v. Northern Assurance Company*, 73 Wash. 668.

Counsel for Appellant contends that the policy, although apparently for one year contained the typewritten warranty limiting the use of the vessel to certain waters of Southeastern Alaska with the privilege of making one round trip between Seattle and policy limits, and that inasmuch as she had made the round trip mentioned in the typewritten warranty, the policy expired when the vessel returned to Seattle (App. Brief, p. 39).

The Insurance Company's conduct in issuing the indorsement of October 19, 1925, long after the vessel returned to Seattle, permitting its use on the Sound, is an interpretation of the contract which estops it from making any such claim.

Appellant, not having discussed the question of liability for the loss under the policy as reformed, but having predicated its right to a reversal solely on the grounds that the Court erred in adjudging reformation of the policy, we will not burden the

Court with a discussion of that phase of the case. Suffice it to say that under the law as announced by the following authorities:

Joyce on Insurance, Vol. 4 (Ed. 1918) Sec. 2167

The Patapsco Ins. Co. vs. Coulter (3 Pet. 223, 7 L. Ed 660)

Orient Mutual Ins. Co. vs. Adams (123 S. C. 67, 31 L. Ed. 63)

Joyce on Insurance, Vol. 4, P. 3702

1 Phillips on Insurance 402.

appellee was clearly entitled to recover under the policy as reformed.

We respectfully submit that the judgment of the Trial Court should be affirmed.

CHARLES T. PETERSON,

Attorney for Appellee.